Supreme Court, U.S.
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In The

Supreme Court of the United States

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Petitioner,

v.

CARLOS SAFIE, individually, and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Respondents.

On Petition to Invoke All Writs Jurisdiction
To The Supreme Court of the State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE RIGHT TO DEVISE PROPERTY IS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. WHETHER THE DUE PROCESS CLAUSE REQUIRES A COURT TO PROVIDE A REASONED EXPLANATION FOR DEPRIVING A DECEDENT OF THEIR RIGHT TO DEVISE PROPERTY?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are:

Delmy Safie, individually and as Personal Representative of the Estate of Alejandro T. Safie

Carlos Safie, individually

Executive Banking Corporation, a Florida corporation

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BASIS FOR UNITED STATES SUPREME COURT JURISDICTION

On January 5, 2005, the Florida Supreme Court entered its final Order Denying Petitioner's Petition to Invoke All Writs Jurisdiction. By Order, no Petition for Rehearing was permitted, and none was filed. The statutory provision which Petitioner believes to confer jurisdiction in this Court to review on a Writ of Certiorari the judgment or Order below is 28 U.S.C. § 1257(a). In accordance with Rule 29(4)(c) of this Court, since 28 U.S.C. § 2403(b) may apply, notice is being provided to the Attorney General of the State of Florida.

CONSTITUTIONAL PROVISIONS AND STATUTES IMPLICATED BY THIS PETITION

U.S.C. Const. Amend. XIV §1.

Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. Art. V §3(b)(3)

(b) Jurisdiction. The Supreme Court ...:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

STATEMENT OF THE CASE

This Petition for Certiorari challenges the decisions of two lower Florida Courts which, Petitioner says, deprived a decedent of his fundamental right to devise property in the manner set forth in his Last Will. The challenge is premised upon a denial of due process, both as to the deprivation of property rights and the flawed Florida appellate procedure which allowed that deprivation.

The lower courts declined to give reasoned opinions that justify this outcome or discuss the emerging modern trend on point which reaches a contrary result. Florida's Third District Court of Appeal, an intermediate appellate court, summarily disposed of the matter without written opinion by citation to two factually inapposite cases as though the point of law was well-settled.

Petitioner filed all motions available under Florida's appellate procedure to request a reasoned explanation that assured this result was not reached arbitrarily. In her Motion for Rehearing *En Banc*, Petitioner advised the Third District this result offended the decedent's right to devise property protected by the Florida constitution.[1] Again without comment, the intermediate appellate court denied any relief.

This Honorable Court has not yet decided whether the Fourteenth Amendment will protect the right to devise property. Hence, Petitioner was not at liberty to so argue below. However, in requesting the Florida Supreme Court invoke its "all writs" jurisdiction, Petitioner argued this Court has held "the total abrogation of the right to devise property is unprecedented and likely unconstitutional."

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[1] *Shriner's Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990). (the Florida constitution protects the right to devise property).

Hodel v. Irving, 481 U.S. 704, 716, 107 S.Ct. 2076, 2083 (1987). Petitioner also argued the lower courts failed to follow the authority they cite which mandates the Decedent's intent is paramount and controlling.

The Florida Supreme Court dismissed the Petition having determined it lacked jurisdiction to review a District Court decision issued without a written opinion. Thus, Petitioner is left with no explanation why the Decedent's clear testamentary intent established by compelling evidence and set forth in his last Will was not followed. This violated the decedent's right to due process under the Fourteenth Amendment to the United States Constitution as it is arbitrary and capricious.

In 1980, the decedent, Alejandro T. Safie, founded a bank known as Executive National Bank in Miami, Florida, a family institution of which the Decedent was President and Chairman. His eldest son, Respondent Carlos Safie ("Carlos"), acted as its Chief Executive Officer. The Decedent controlled the Bank through his ownership of 1,357 preferred shares of stock in the Bank's holding company. The shares were held in a Revocable Trust established by the Decedent as grantor in 1981 (the "Trust"). Under the Trust, the Decedent also acted as the sole Trustee. (*see Exhibit 1 to Appendix C,* incorporated herein by reference).

On March 23, 1999, believing the Trust terminated by its terms, the decedent executed a Will (the "1999 Will"). (*see Exhibit 2 to Appendix C,* incorporated herein by reference). The only specific devise provision of the 1999 Will declared: "At the time of the execution of this Will, I am the owner of 1,357 Preferred Shares of Executive Banking Corporation Stock...." Both the Trust and the 1999 Will provided that Carlos inherited a majority of the preferred shares and exclusive control of the Bank.

Six months before his death, the decedent revoked the 1999 Will by executing a new Will on November 29, 2001 (the "2001 Will"). His expressed purpose was to ensure his son, Carlos, did not inherit control of the Bank. The 2001 Will changed the specific devise provision of the 1999 will to provide Carlos should inherit only thirty (30%) percent of the preferred shares - not a majority. The majority of the 1,357 preferred shares were now devised to the decedent's wife and his other children. (*see Exhibit 3 to Appendix C,* incorporated herein by reference).

According to the unchallenged Affidavit of the attorney who drafted these wills, the decedent was vehemently upset with Carlos' performance as Chief Executive Officer of the Bank.[2] (*see Exhibit 4 to Appendix C,* incorporated herein by reference). The draftsman's affidavit states:

> Mr. Safie indicated to me that his intent was to completely change the specific devise with regard to the preferred shares of stock of Executive Banking Corporation. Mr. Safie specifically stated that he no longer wanted Carlos Safie to have the majority interest in the shares of stock because he was upset with how Carlos was handling the affairs of the Bank.

And further, in paragraph seven (7), he states:

> ... It was readily apparent that Mr. Safie was totally aware of the various terms and provisions of the Will and was intent on

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[2] Only months before, the Office of the Comptroller of the Currency found violations of federal banking regulations and forced the Bank into a Formal Written Agreement, under which it operated for some years.

radically changing the dispositive provisions of the previous Will.

Before his death, the decedent gave his wife, the Personal Representative under the 2001 Will, carefully sealed envelopes which contained the stock certificates for the preferred shares and the original 2001 Will. He instructed her to keep the envelopes in a safe deposit box until after his death.

In May of 2002, the decedent died. When the 2001 Will was published, Carlos produced a photocopy of the Trust agreement claiming it controlled. Carlos asserted the preferred shares remained held by the Trust in the absence of a writing to establish the decedent gave written notice of its revocation to himself, as Trustee.

The original Trust instrument was last known to be in the decedent's possession. Not surprisingly, the parties never found it among his belongings. A bank security guard testified the decedent ordered him to destroy bags of personal documents at the time he prepared the 2001 Will.

The Personal Representative sought a declaratory judgment that the 2001 Will should control disposition of the preferred shares. Cross-motions for Summary Judgment were filed. On May 1, 2003, the trial court granted Summary Judgment to Respondents citing the only Florida case to ever address conflicting provisions between a Revocable Trust and a later Will. *Euart v. Yoakley,* 456 So. 2d 1327, 1328 (Fla. 4th DCA 1984).

The trial court seemingly ignored the primary holding of *Euart* that the decedent's intention is the "polestar consideration" and controlling. *Id. at 1329.* The trial court found that although the decedent proposed to devise the preferred shares by his will, he simply could not upon the authority of *Euart.* The trial court found the

decedent never revoked Trust in strict conformity with its terms. (*see Appendix A,* incorporated herein by reference).

The trial court made no effort to reconcile the material factual differences between *Euart* and this case. In *Euart*, the decedent did not act as the sole Trustee of the Trust. *Id.*, at 1329. The decedent's intention was hotly contested in *Euart*. *Id.* at fn. 2. Yet, even in *Euart*, the Court conceded that a Will may constitute a writing sufficient to revoke a Trust where evidence shows that the"manifest intent" of the testator was for it to do so.

Respondents never challenged the Affidavit of the Wills' draftsman which clearly expressed the decedent's intent in preparing the 2001 Will. Moreover, after preparing the 1999 Will, the decedent told his accountant the Trust terminated by its terms in 1999. The decedent later told the Federal Reserve Bank of Atlanta he owned the preferred shares personally in a letter signed by his attorney and a senior executive officer and Secretary of the Bank holding company. The trial court declined to comment on any of this evidence.

The trial court summarily concluded that neither the 1999 Will nor the 2001 Will, whether read alone or together, demonstrate a revocation of the Trust. There was no explanation why the decedent proclaimed his ownership of the preferred shares in both the 1999 and 2001 Wills without reference to the Trust. Moreover, the trial court never reconciled why the 1999 Will distributed the preferred shares in the exact manner as the Trust if the decedent intended the Trust to remain viable.

On Appeal, Petitioner argued this was a case of first impression in Florida. Petitioner informed the Third District that a modern trend promulgated by the Uniform Trust Code and Restatement 3d of Trusts was presently emerging on this point. If adopted, the modern trend of

Trusts would find the Decedent's later Wills revoked the Trust.[3] Petitioner argued that Florida should join those states which recognize the absurdity of requiring a decedent to revoke a Trust by giving written notice himself, as Trustee.[4] Finally, Petitioner argued the Trust terminated by operation of the Merger Doctrine.

The Third District did not discuss these fully briefed arguments, never addressed by *Euart*, which remain unsettled in Florida. On March 17, 2004, the Third District issued a *per curiam* affirmance with citations to *Euart*,[5] ("citation PCA") as though the law was well settled and warranted no further discussion. To the contrary, *Euart* itself is a paradigm of the need for further inquiry. There, the dissenting opinion found, "[a]pplying the very authority cited by the majority I reach a contrary result." *Euart*, at 1330. Despite having a *de novo* standard of review, the Third District made no findings of the Decedent's intent (the "polestar consideration" under *Euart)* before arbitrarily issuing its citation PCA.

Petitioner requested all relief available under the Florida Rules of Appellate Procedure in moving for a written opinion, for rehearing, for rehearing *en banc*, and for certification that the issue was of great public

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3 *See, Restatement 3d of Trusts*, §63, Cmts. (h) and (i) (2003) and *Uniform Trust Code*, § 602(c) (2001).

4 *See, Barnette v. McNulty*, 516 P. 2d 583 (Ariz. App. Div. 2, 1974); *Sabin-Scheiber v. Sabin*, (340 N.W. 2d 114, 116) (MI 1983); *St. Louis Union Trust Co. v. Dudley*, 162 S.W. 2d 290, 294 (MO. App.1942); *Miller v. Exchange National Bank of Tulsa*, 80 P. 2d 209, 211 (OK 1938).

5 The Third District also cited *Macfarlane v. First National Bank of Miami*, (203 So. 2d 57 (Fla. 3d DCA 1967)), which holds a Trust must be revoked in strict conformity with its terms. *Macfarlane*, also cited by the *Euart* Court, does not address conflicting Will and Trust provisions.

importance. Petitioner argued a written opinion was necessary as *Euart* was factually inapposite and does not address these unique questions of first impression. Petitioner likewise argued that the law remained unsettled, warranting discussion beyond *Euart*. Only weeks after the Third District issued the citation PCA, the Supreme Court of Nebraska became the first state to formally adopt the modern trend of Trusts under a case which presented nearly identical facts.[6]

Petitioner also argued the Trust terminated by operation of law under the doctrine of merger; Respondents answered that the merger doctrine had been repealed. They were wrong as a matter of law. The Third District ignored the argument without comment. The authorities cited in the Third District's opinion never considered the point.

In seeking rehearing *en banc*, Petitioner's counsel certified this case was of exceptional importance as the decedent was denied his fundamental right to devise his property as protected by the Florida Constitution. Without explanation, the Third District summarily denied Petitioner all requested relief. (*see, Appendix B*, and incorporated herein by reference).

By refusing to give a reasoned explanation for its decision, the Third District denied the Florida Supreme Court jurisdiction to answer these questions of first impression. Under Article V of the Florida Constitution, as amended in 1980, the Florida Supreme Court has no jurisdiction to review the decision of a District Court that issues a citation PCA.[7] There are no set standards in Florida

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[6] *In re: Wendland - Reiner Trust*, 267 Neb. 696, 677 N.W. 117 (Neb. 2004).

[7] Florida Constitutional Amendment Article V 3(b)(3); *see generally, Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *St. Paul Title Ins. Co. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1981).

which require a District Court to write an opinion or certify the matter is of great public importance. In the most arbitrary manner, the Third District refused to explain how *Euart* is controlling, why a written opinion was not warranted, and how the denial of a protected property right was not a question of great public importance. As a result, the Third District shielded its decision from further review by the Florida Supreme Court and denied Petitioner due process of law.

Petitioner, nonetheless, implored the Florida Supreme Court to invoke its "all writs" jurisdiction in a final effort to obtain further review.[8] Petitioner argued below that this Honorable Court had found the abrogation of a decedent's right to devise property is likely unconstitutional.[9] She further argued, "after years of costly litigation, Petitioner remains in total darkness as to why the lower Courts summarily rejected her counsel's thoroughly briefed legal arguments to reach a result so clearly at odds with ... the 2001 Will."

Petitioner challenged the citation PCA as arbitrary and improper where it misapplied the law in an area that is unsettled. Under strikingly different facts, the three judges of the *Euart* Court are the only jurists in Florida to ever discuss issues similar to this appeal and they could not reach a unanimous decision.

Without addressing the merits of Petitioner's arguments, the Florida Supreme Court ruled that it lacked jurisdiction to review a citation PCA issued without a

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[8] *See,* Article V 3(b)(7), Fla. Const. and Fla. R. App. P. 9.030(a)(3).

[9] *Hodel v. Irving*, 481 U.S. 704, 716, 107 S.Ct. 2076, 2083 (1987).

written opinion.[10] The Florida Supreme Court dismissed the Personal Representative's Petition on January 6, 2005. This Petition follows.

ARGUMENT

I. A DECEDENT'S RIGHT TO DEVISE PROPERTY IS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

This Honorable Court instructs "the first inquiry in every due process challenge is whether the Petitioner has been deprived of a protected property interest." *American Manufacturers Mutual Ins. Co., v. Sullivan*, 526 U.S. 40, 59, 119 S.Ct. 977, 989 (1999). This Honorable Court has yet to formally declare the right to devise property is a protected property right. However, this Court has found the right to pass on property to one's heirs, and one's family in particular, is a valuable right that has been part of the Anglo-American legal system since feudal times. *Hodel v. Irving*, 481 U.S. 704, 715-6, 107 S.Ct. 2076, 2083 (1987). This Court likewise has found the "total abrogation of the right to devise property is unprecedented and likely unconstitutional." *Id.*

The Fourteenth Amendment of the United States Constitution protects life, liberty, and property from invasion by the states without due process of law. *U.S.C., Const. Amend. XIV.* It is well settled that this constitutional amendment protects the right to acquire, use and dispose of property. *Buchanan v. Warley*, 245 U.S. 60, 74, 38 S.Ct. 16, 18 (1917); *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972) (right to enjoy property without unlawful deprivation has long been

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10 Persaud v. State, 838 So. 2d 529, 533 (Fla. 2003).

recognized as a basic civil right). The Florida Supreme Court has held the right to devise property is a fundamental right protected by the Florida Constitution. *Shriner's Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990).

Respectfully, this Honorable Court should find the right to devise property is protected under the fourteenth amendment. While the decedent was alive, he enjoyed a constitutionally protected property right to deal with the preferred shares as he saw fit. Should the rule be any different in death? This Honorable Court should find the decedent's protected property interest in the 1,357 preferred shares granted him the right to order their disposal by his clear testamentary instructions. A right upon which the Courts may not arbitrarily impinge. As the Florida Supreme Court admonished, "courts should be reluctant to undo in death, what the testator in life sought to accomplish." *In re: Donnely's Estate*, 188 So. 108, 118 (Fla. 1938).

By enforcing the Trust over the 2001 Will, the lower Florida courts denied the decedent's right to dispose of his property as he saw fit. This result is arbitrary where the intermediate appellate court refused all requests for a reasoned written opinion that explains this result. Petitioner here argues that this arbitrary refusal offends due process. The absence of any standards for when the court is obliged to write an opinion underscores the constitutional infirmity.

II. THE FLORIDA COURTS' REFUSAL TO PROVIDE A REASONED EXPLANATION FOR ITS DECISION DEPRIVED THE DECEDENT OF DUE PROCESS

A. A Court Order Issued Without A Reasoned Explanation Is Arbitrary and Capricious

Once it is determined that a person's protected property interest was deprived, this Court must determine whether the State's procedures which caused this deprivation comport with due process. *American Mfrs. Mutual Ins. Co., v. Sullivan*, 526 U.S. 40, 59, 119 S.Ct. 977, 989 (1999). "It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *see also, Logan v. Zimmerman Brush Company*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1155 (1982) (the hallmark of property is an individual entitlement grounded in state law which cannot be removed except for cause).

A decade after ratification of the Fourteenth Amendment, this Honorable Court held that all state action does not comport with due process of law merely because the State declares it so. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). Any state action which simply declares in terms, without more, that title to property vested in "A" is hereby vested in "B" is a deprivation of due process within the meaning of the constitutional amendment. *Id.* The Due Process Clause protects against the arbitrary deprivation of property and reflects the high value our constitutional and political history place on a person's right to enjoy what is his, free of governmental interference. *Fuentes v. Shevin*, 407 U.S. 67, 80-1, 92 S.Ct. 1983, 1996 (1972).

Since the Magna Carta, the Due Process Clause has limited the powers of all branches of government, including the judiciary. *Truax v. Corrigan*, 257, U.S. 312,333, 42 S.Ct. 124, 129 (1921). "The vague contours of the Due Process Clause do not leave judges at large." *Rochin v. People of California*, 342 U.S. 165, 170, 72 S.Ct. 205, 209 (1952). Judges have long been required to publicly give a reasoned opinion from the bench in support of their judgment. *Id.* at fn. 4. Arthur J. England Jr., Chief Justice Emeritus of the Florida Supreme Court recently noted: "[W]e expect judges, like no other public official, to justify their decisions with reason." Arthur J. England Jr., *Asking For a Written Opinion From a Court That Has Chosen Not To Write One*, 78-Mar Fla. B. J. 10, 14 (March 2004).

This Honorable Court may interfere with any state court judgment it finds to be arbitrary, capricious, or in conflict with fundamental principles protecting private rights. *American Ry. Express Co. v. Commonwealth of Kentucky*, 273 U.S. 269, 273, 47 S.Ct. 353, 355 (1927). In the context of substantive due process, the reason given to support state action which deprives property may not be so inadequate that it may be characterized as arbitrary. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974). State action is "arbitrary" when taken without reason or for merely pre-textual reasons. *Decarion v. Monroe County*, 853 F. Supp 1415, 1421 (S.D. Fla. 1994).

The "arbitrary and capricious" standard requires a State examine the relevant data and articulate a satisfactory explanation for its action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm,* 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983) citing *Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962). As the Florida Supreme Court noted, "one of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Roberson v. Florida*

Parole and Probation Commission, 444 So. 2d 917, 921 (Fla. 1983).

The Third District deprived the Decedent's property right in an arbitrary manner which prevented further review by the Florida Supreme Court. The Third District acted arbitrarily by refusing to issue findings, and a reasoned opinion based on those findings, before depriving the decedent of his property rights. Florida's appellate procedure encouraged this result by granting the Third District unfettered discretion to decide which of its decisions will be reviewed and which will not. As discussed below, the Florida Supreme Court lacks jurisdiction to review any district court decision issued without a written opinion. The district court can refuse to issue a written opinion for any reason or for no reason at all. This arbitrary result offends due process.

B. The Florida Appellate Procedure Offends Due Process as Applied to this Case

Given the procedural setting of the within case, this proceeding is Petitioner's first opportunity to raise the due process arguments advanced herein. Until rebuffed by the Florida Supreme Court, the application of the flawed Florida procedure which deprived Petitioner of her avenue of review by the state's highest court was not drawn into issue. It is the absence of standards and the inability for the Petitioner to be afforded consideration by the State's high court in an area of property rights and emerging trends of law that runs afoul of the concepts of due process in this case.

This Honorable Court has established the rule that, what might be generally considered a valid and legitimate exercise of state power, may be held constitutionally invalid when it operates to deprive an individual of a protected right. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct.

780, 787 (1971). Once a state has established avenues of appellate review, the avenues must be kept free of unreasoned distinctions that can only impede equal and open access to the courts. *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500 (1966). By refusing to explain its decision, the Third District denied Petitioner equal and open access to the Florida Supreme Court in contravention of due process.

This Honorable Court has identified three factors which normally determine whether an individual has received the process that the Constitution finds due. *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335, 903.

Only by weighing these concerns, can courts determine whether a state has met the fundamental requirement of due process. *City of Los Angeles v. David*, 538 U.S. 715, 717, 123 S.Ct. 1895, 1896 (2003).

1. "The private interest that will be affected by the official action;"

The first factor is satisfied here where, for reasons discussed at length, *infra.*, the lower Florida courts denied

the decedent's right to dispose of his 1,357 preferred shares as he saw fit, free from arbitrary government interference. The Third District dismissed the 2001 Will which purposefully and radically altered the disfavored estate plan expressed in both the 1999 Will and the Trust. The valid 2001 Will clearly provides Carlos should not inherit control of Executive National Bank as its redistributed the preferred shares to prevent this result. As the decedent's private interest in the preferred shares has been abrogated entirely, this Honorable Court should impose the highest protections available under the Fourteenth Amendment.

2. "The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;"

There is a high probability that this arbitrary denial of due process was preventable with additional safeguards that permit the Florida Supreme Court to exercise discretionary review of a citation PCA. In 1980, Article V of the Florida Constitution was amended to divest the Florida Supreme Court of jurisdiction to review a PCA without a written opinion.[11] Justice England, then Chief Justice of the Florida Supreme Court, noted this amendment was intended to "free the court from non-policy type of decisions and direct its efforts to issues of statewide importance or jurisprudential significance." England, Hunter, and Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 Fla. L. Rev, 147, 200 (1980). Justice England forewarned that, in its new role as a limited policy-maker and law-harmonizer, the Supreme Court must remain vigilant not to "lose the mantle

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[11] Florida Constitutional Amendment Article V 3(b)(3); *see generally, Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *St. Paul Title Ins. Co. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1981).

of restrained supremacy which the amendment invites them to don." *Id.*

In 1993, the Honorable Judge Gerald B. Cope, Jr., of the Third District Court of Appeal, published an extensive article analyzing Florida's Appellate Procedure after the 1980 Amendment. Gerald B. Cope Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 Fla. L. Rev. 21 (Jan. 1993). Judge Cope concluded that Florida's written opinion requirement was enacted in a time of crisis and imposed "the most severe limitation on access to the State Supreme Court of any American jurisdiction." *Id.* at 93. This imposition was made under the "faulty premise" that a written opinion requirement was necessary to avoid successive appeals in every case. *Id.*

Florida's threshold requirement of a written opinion for Supreme Court jurisdiction has been subject to ardent criticism. Judge Cope argues this requirement is unsound as its permits review by the United States Supreme Court while depriving the Florida Supreme Court jurisdiction to review the same matter. *Id.* at 80. Judge Cope also notes the practice of issuing a PCA is entirely unregulated and inconsistently applied throughout the District Courts. *Id.* Moreover, Judge Cope observes that PCAs are routinely issued improperly to resolve cases that present debatable legal issues as evidenced by the dissenting and concurring opinions that often follow. *Id.*

Practitioners have also published articles that lament the arbitrariness of Florida's written opinion requirement. One attorney cited several examples where the District Court improvidently issued a PCA to "make it clear that the absence of an opinion is not synonymous with absence of significant legal issues. Powell and Maguire, *The PCA Debate – An Executive Overview*, 1 Fla. Coastal L.J. 67

(Spring/Summer 1999). Another attorney writes of attending a seminar where a Third District judge unabashedly told the audience, "we can run and we can hide" as no rule prohibits a district court from issuing a PCA for arbitrary reasons. Steven A. Been, *Letters*, 78-May Fla. B. J. 4 (2004).

In a passionate argument which contends that Florida's Appellate system is structurally defective, another attorney noted many instances where Florida District Courts issued a PCA without opinion which was later overturned by this Honorable Court, Federal Courts of Appeals, the Florida Supreme Court and other District Courts. Stephen Krosschell, *DCAs, PCAs, and Government In the Darkness*, 1 Fla. Coastal L. J. 13, 31-44 (Spring/Summer 1999).

Two decades after the 1980 amendment, the Florida Supreme Court commissioned a report to study the use of PCA decisions. *See*, Comm. on Per Curiam Affirmed Dec., Final Report and Recommendations (May 2000).[12] The majority reported that the PCA performs a useful function when used properly. *Id.* at 29. However, several practitioners on the committee criticized the ever increasing use of PCAs in their dissent to the final report. *Id.* at 40-53. They cite a widespread PCA problem which appears arbitrary and undermines the quality of appellate justice in Florida. *Id.* The Florida Supreme Court adopted the PCA Committee's recommendation to amend Rule 9.330 of Florida's Appellate Procedure to allow litigants to request a written opinion from the Court effective January, 2003.

Now in private practice, Justice England recently concluded this amendment to Rule 9.330 is also conceptually flawed and should be repealed. Arthur J. England, Jr., *Asking for Written Opinion from a Court That Has Chosen Not to Write One*, 78-Mar Fla. B. J. 10, 16

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12 www.flcourts.org/sct/sctdocs/library.html#reports

(March, 2004). Justice England recognized a procedural infirmity in that "asking a District Court to provide an opinion that will expose their rationale to Supreme Court review puts expressly in the hands of District Court judges the discretion to allow or not allow review." *Id.* at 15. Moreover, District Court judges lack the institutional experience needed to exercise this discretion expressly granted to the Supreme Court Justices by the Florida Constitution. *Id.*

It should be particularly vexing that the lower Florida courts refused to articulate a reasoned explanation for denying the Decedent's fundamental right to dispose of his 1,357 preferred shares by the 2001 Will. The Third District cannot arbitrarily justify this result by citation to authority that addressed factual situations materially at variance with the case under review. *Belcher v. Belcher,* 271 So. 2d 7, 13 fn. 16 (Fla. 1972); *Gibson v. Avis Rent-A-Car System, Inc.,* 386 So. 2d 520, 522 (Fla. 1980); *Acensio v. State,* 497 So. 2d 640, 641 (Fla. 1986). It is also "fundamental black letter law" in Florida that a citation PCA is improper unless "the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliot v. Elliot,* 648 So. 2d 137, 138 (Fla. 4th DCA 1994). This arbitrary result, and Florida's written opinion requirement which permits it, are repugnant to the Due Process Clause.

As recognized in *Euart*, the Third District's "polestar consideration" should be to accomplish the decedent's testamentary intent. The Third District gave no reasoned explanation to reconcile evidence that the decedent (1) prepared the 1999 Will believing the Trust no longer viable; and (2) spent weeks preparing the 2001 Will before his death. The Third District also ignored, without comment, the emerging trend set forth in the Restatement Third of Trusts § 63 (Cmts h & i) (2003) and the Uniform Trust Code §602(c)(2001) which would enforce the 2001

Will over the Trust. Petitioner informed the Court that the Supreme Court of Nebraska adopted the Restatement position weeks after the citation PCA to no avail.[13] The Third District arbitrarily declined to comment rather than expose its decision to violate the Decedent's protected property right to further review. Petitioner attributes no ill motive to the Third District. However, a system which permits even an appearance that a court has ruled arbitrarily offends that which is right.

As Judge Cope concludes, Florida's written opinion requirement runs counter to the ABA Standards, the experience of all other states, and the recommendations of the Supreme Court Commission on the Florida Appellate Structure. Cope, at 93-4. The Florida Supreme Court should have jurisdiction to review any case on the basis of importance, regardless of whether the District Court chose to write an opinion. *Id.* Alternatively, Florida's appellate procedure should adopt the California system which permits Supreme Court review where litigants have sought, but failed to obtain, a written opinion. *Id.*

This honorable Court should find Florida's written opinion requirement repugnant to the Due Process Clause as applied to this case which involves a protected property right and an unsettled area of law. This Court should require Florida adopt a procedural safeguard, with appropriate standards, which grants the Florida Supreme Court jurisdiction to review any case which presents a question of exceptional importance. Cases which may deprive a litigant of their constitutional rights are certainly of exceptional importance. *In the Interest of D.J.S.*, 563 So. 2d 655, 657 fn. 2 (Fla. 1st DCA 1990). Due Process mandates that state courts enforce protected property rights or provide a reasoned explanation for their deprivation.

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[13] *In re: Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W. 2d 117 (Neb. 2004).

Florida's written opinion requirement runs counter to that mandate. It encouraged the District Court to abuse its discretion to issue a PCA and arbitrarily deny the decedent's right to devise his property as he saw fit.

3. "The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Presently, Florida's appellate procedure requires that a motion for rehearing *en banc* contain a certification by counsel that case is of exceptional importance. Fla. R. App. P. 9.331. Judge Cope suggests that screening of petitions for exceptional importance will be much less arduous than screening for conflict jurisdiction as it will be "facially obvious whether the question presented is important or not." Cope, at 102. As a matter of policy, the Florida Supreme Court should continue to decline review of a citation PCA for conflict jurisdiction. However, the lack of a written opinion should only be a factor to considered in determining whether an important question is presented.

The government's paramount interest should favor the fair administration of justice in a manner that affords due process to all litigants. It is axiomatic that an excessive judicial workload necessarily hinders the government's ability to achieve this result in a timely manner. Petitioner does not suggest the Court should find due process requires a written opinion be rendered is each case. However, the courts of California, Texas, Ohio, Kentucky, Wisconsin and Washington are all required by statute or constitutional amendment to provide a written explanation for their

decision in each case.[14] The government's interest in managing the workload of the Florida Supreme Court should not truncate Petitioner's right to appellate review when constitutional rights are at stake. The increase to the Florida Supreme Court's workload will not be substantial if this Honorable Court mandates Judge Cope's recommendations. The Due Process Clause should not permit the Third District to shield its decision from further review by citation PCA.

Beyond notice and an opportunity to be heard, Due Process requires a Court provide a reasoned opinion for its decision. The Florida Supreme Court has a different judicial function than that of the intermediate courts of appeal.[15] Surely, in weighing the rights of litigants to have the State's highest court pronounce the state of the law in the area of disposition of property (an area of Constitutional protection), due process should prevail over a tenuous link to the laudable goal of attempting to manage the Supreme Court workload.

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[14] *See,* Cal. Const. art. 6, §14 (decisions of the Supreme Court and courts of appeal shall be in writing with reasons stated); Tex. R. App. P. 90(a) (written opinion must address every issue raised and necessary to final disposition of appeal); Ohio R. App. P. 12 (courts of appeal shall give reasons in writing for its decision); Ky. R. Civ. P. 76.28(1)(b) (opinions shall include an explanation of legal reasoning underlying the decision) Wis. Stat. Ann. §752.41(1) (West 1981) (court of appeal shall provide a written summary of reasons for the decision in each case); Wash. Rev. Code Ann. §2.06.040 (West 1988) (all decisions shall be in writing and state the grounds therefore).

[15] Justice England notes that only the justices have the institutional experience to determine if the time is propitious to exercise the Supreme Court's policy making responsibility. Arthur J. England Jr., *Asking For a Written Opinion From a Court That Has Chosen Not To Write One,* 78-Mar Fla. B. J. 10, 14 (March 2004).

CONCLUSION

Petitioner believes that, in the within case, the decedent's obvious testamentary intent was not followed so as to deprive him of his right to dispose of his property as he saw fit. This arbitrary result offends due process which warrants the acceptance of jurisdiction and an Order that the parties brief their respective arguments. Petitioner so prays.

Respectfully submitted,

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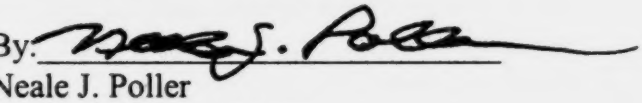
By: 
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